Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Application of	)	
	)	
FAIRLEIGH DICKINSON UNIVERSITY	)	File No. BPED-751
	)	
For a Construction Permit for a New Non-Commercial Educational FM Station at Teaneck, New Jersey	)	
	)	
To: The Commission	)	

PETITION FOR RECONSIDERATION

New York University (hereinafter "NYU"), an applicant (BPED-742) for FM Channel 206 in New York City, by its attorneys, hereby requests that the Commission reconsider the acceptance for filing of the application of Fairleigh Dickinson University (hereinafter "FDU") for FM Channel 206 at Teaneck, New Jersey, which was announced by Public Notice dated July 22, 1966 (Mimeo No. 87056). In support of this request, the following is shown:

1. By Memorandum Opinion and Order released May 2, 1966, 7 R.R. 2d 273, the Commission announced its qualified acceptance of the application of NYU for non-commercial educational FM Channel 206 in New York City, and invited other applications for the same facility from any other interested party. All such applications were to be filed on or before June 16, 1966.

2. On June 16, 1966, FDU tendered its application for the facility, to be operated at Teaneck, New Jersey. That application, however, was returned to FDU by letter dated June 24, 1966, in which it was indicated that

the application was in violation of Section 1.573 (Note)(c) of the Commission's Rules, and could not be accepted.

3. Thereafter, on July 11, 1966, FDU retendered its application in amended form, and filed simultaneously a "Petition For Reconsideration Of Staff Action And Acceptance Of Application, Nunc Pro Tunc, Together With Waiver Of The Rules Or Acceptance Of Minor Corrective Amendment". Service on petitioner NYU was made by mail. By Public Notice dated July 22, 1966 (Mimeo No. 87056), the acceptance of the FDU application was announced. It is submitted that the acceptance of the FDU application was erroneous, and that the action must be reversed.

4. First, as a procedural matter, the time for response to FDU's July 11th petition had not yet run. Section 1.45 (a) of the Commission's Rules provides that oppositions to such pleadings may be filed within 10 days after the filing of the petition. In addition, Section 1.4 (g) allows an additional 3 days where, as here, service of the pleading is made by mail. Accordingly, petitioner herein, NYU, had until July 25, 1966 (July 24 being a Sunday) to file an opposition to FDU's Petition. And, in fact, NYU had formulated its Opposition, and had intended to file that pleading on July 25. Accordingly, the granting of FDU's request prior to the expiration of time allowed for oppositions was clearly contrary to the provisions of the Rules cited, and denied NYU its procedural rights.

5. Moreover, while the Commission issued no statement of its reasons for accepting the FDU application after the June 16, 1966, cut-off

date, it is obvious that the acceptance could only be predicated on a grant of FDU's July 11th Petition. That pleading, however, offered no valid basis for accepting the application. In retendering its application, FDU argued essentially (a) that Section 1.573 (Note)(c) of the Commission's Rules should be waived, and the application tendered on June 16, 1966, be accepted nunc pro tunc, or in the alternative, (b) that the June 16th application as filed should have been considered "substantially complete" under Section 1.564 of the Rules, and thus accepted, with permission to thereafter submit a "minor corrective amendment".

FDU's Non-Compliance With Section 1.566 of the Rules

6. With respect to the second argument, FDU's contention is neither accurate nor persuasive. Section 1.564 of the Rules provides, in pertinent part:

> (a) . . . Applications found to be complete or substantially complete are accepted for filing and are given a file number. In case of minor defects as to completeness, the applicant will be required to supply the missing information. Applications which are not substantially complete will be returned to the applicant.

As FDU acknowledged (Petition, paragraph 9), the Rule addresses itself to defects "as to completeness". Here, of course, the FDU application tendered for filing on June 16th was not returned because it was incomplete. Rather, it was returned because the information supplied in the application was patently in conflict with the Commission's Rules. Indeed, in the Commission's letter of June 24th returning the application, the specific reason for its return was stated to be that WRRH, Franklin Lakes, New Jersey, "will cause

interference within the [FDU] proposed 1 mv/m contour which is in violation of Section 1.573 (Note) (c) of the Rules".

7. FDU's argument based on Section 1.564 of the Rules, therefore, is clearly a non sequitur. Rather, the obvious basis for the initial return of its application was Section 1.566 of the Rules, which provides, in relevant part:

> Applications which are determined to be patently not in accordance with the Commission's rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.

In this instance, not only was FDU's application "patently not in accordance with the Commission's rules", but no request for waiver, either informal or formal, accompanied the application. Perforce no basis for the grant of any waiver was presented. As a consequence, the return of FDU's application was in accord with the Commission's Rules, and eminently correct. See, e.g., Camellia Broadcasting Co., Inc., 20 R.R. 12, 14 (1960); The Helm Coal Co., 6 R.R. 547, 548 (1950). See also WCAR, Inc., 5 R.R. 950a (1949).

8. While FDU referred in its Petition to NYU's having been accorded an opportunity to amend its application by the Commission's May 2 Memorandum Opinion and Order, that fact did not support FDU's request here. First, FDU ignored the fact that the Commission's Order established a cut-off date of June 16, 1966, for all applicants, including NYU. And the

reference to amending NYU's application in that Order was not an extension of permission to amend after an earlier-specified cut-off date. Hence, FDU's position was hardly analogous to that of NYU at the time of the Commission's May 2 Opinion.

9. Rather, what FDU was actually attempting was the tendering of a new, amended proposal -- admittedly different in numerous technical aspects from that originally filed -- after the designated cut-off date. The Commission, however, has repeatedly made clear that applications tendered after a specified cut-off date will not be accepted. E.g., Radio Station WAYX, Inc., 19 R.R. 931 (1960); Marietta Broadcasting Co., 19 R.R. 920 (1960); Crawford County Broadcasting Co., Inc., 19 R.R. 916 (1960); Community Broadcasting Co., 19 R.R. 911 (1960); Fredericksburg Broadcasting Corp., 19 R.R. 901 (1960). Moreover, the United States Court of Appeals has endorsed fully the Commission's position as a valid method of administrating its processes. See, e.g., Century Broadcasting Corp. v. FCC, 114 U.S. App. D.C. 59, 310 F. 2d 864 (1962). It is submitted, therefore, that the attempted analogy between FDU's posture and that of NYU at the time of the May 2 Order is not a valid one, and that the amended application offered after the specified cut-off date was unacceptable.

FDU's Requested Waiver of Section 1.573 (Note) (c) of the Rules

10. With respect to FDU's first argument -- that its application tendered June 16th should be accepted nunc pro tunc and Section 1.573 (Note) (c) waived "in view of the de minimis nature of the interference involved" --

its position is equally untenable. First, as indicated above, Section 1.566 of the Rules precludes the acceptance of any application in conflict with the Rules "unless accompanied by an appropriate request for waiver". Since it cannot seriously be contended that the Commission must waive its Rules absent a request to do so -- a request which "shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof" under Section 1.566 -- what FDU was really asking was not only that its application, but its request for waiver as well, be accepted nunc pro tunc.

11. However, just as with the late filing of any other required pleading, "good cause" for not having timely filed its waiver request must be shown by FDU. See Section 1.46 of the Rules. And it is submitted that no such showing was -- indeed, could have been -- made under the circumstances presented. Section 1.573 (Note) (c) (2) of the Rules, the knowledge of which applicants are charged with, is clear and specific:

> No application for facilities on any channel specified in §73.501 of this chapter will be . . . accepted if the facilities requested would cause objectionable interference within the 1 mv/m contour of any co-channel or adjacent-channel station, or receive interference within the proposed 1 mv/m contour . . . .

Moreover, at the time the Commission released its Memorandum Opinion and Order (FCC 66-393, May 2, 1966), inviting applications for the subject frequency, specific reference to the need for compliance with that no-interference requirement was made:

> . . . applications from other interested parties for operation on Channel 206 will be accepted until [June 16, 1966] . . . with proposals that involve no 1 mv/m interference with other stations. (Emphasis supplied)

12. Hence, both the existence of, and the need to comply with, Section 1.573 (Note) (c) (2) was brought to FDU's attention. Yet it proceeded to file an application which is admittedly in violation of the Rule, and made no effort at the time of filing to request, in any fashion, a waiver of that Rule. FDU's arguments for waiver presented, it is submitted, came too late. Inasmuch as no reasons whatsoever for not having submitted a request for waiver at the time of filing the defective application have been offered, "good cause" for late filing had not been presented, and the subject request could not properly be granted.

13. Even on the merits of FDU's waiver request, assuming arguendo the timeliness of its pleading, the asserted bases for waiver of Section 1.573 (Note) (c) were insufficient. Indeed, among the authorities offered in support of FDU's request, Natick Broadcast Associates, Inc., 6 R. R. 2d 824 (1966), (Petition, paragraph 5), is adversely dispositive of FDU's request. In that proceeding, an application tendered on a "cut-off date" had been returned, for the reason that the proposed operation would result in overlap prohibited by Section 73.37 of the Commission's Rules. Contours for the proposed facility had been based on Figure M-3 projections. Thereafter, the applicant retendered the application with an engineering statement showing that, on the basis of subsequent field intensity measurements, no

overlap would actually result. Arguing that the subsequent engineering study established that the proposal initially submitted was actually not in violation of Section 73.37, the applicant requested acceptance of the application nunc pro tunc the cut-off date. In denying the applicant's request, the Commission stated:

> The Figure M-3 values were equally available to the applicant who was on notice that the application would be considered in light of them, absent any pertinent field intensity measurements to the contrary. Natick, however, did not provide any field intensity measurements until the application was retendered on August 2, 1965; and accordingly, that is the date by which this application must be judged.

3 R. R. 2d at 825.

14. So in this proceeding, FDU's initial application was in violation of the Rules. While continuous emphasis is laid to the assertedly slight nature of the interference area, it is submitted that the situation is not unlike being, in the words of a noted jurist, "a little bit pregnant". The application was, in fact, violative of Section 1.573 (Note) (c). Moreover, as in the Natick decision, FDU was on notice as to the standards which would be applied by the Commission in evaluating the application. (See paragraph 9, supra). And finally, while no real change was made in the retendered Natick application (i.e., antenna height, transmitter, power, etc.), FDU sought to remedy its initial violation of the Rules by an amendment accompanying its retendered application reducing the effective antenna height and the effective radiated power, and thereby substantially altering its originally proposed contours -- a truly major amendment.

15. Other decisions cited by FDU are obviously dissimilar factually from this instance. For example, United Broadcasting Co., Inc., 5 R. R. 2d 684 (1965), quoted at length by FDU (Petition, paragraph 6), involved two applications -- one by a "new applicant", and the other for renewal by an existing licensee. The Commission took pains to restrict its decision to the factual framework there presented. In its holding, the first half of which FDU has inadvertently omitted, the Commission stated:

> Where a prospective applicant can show that, although new prohibited overlap would occur, its proposal on a net basis would cause less prohibited overlap than the renewal of an existing license, strict enforcement of the prohibited overlap rules would tend to frustrate the operation of Section 307 (b) of the Act.

5 R. R. 2d at 690. Here, of course, there is no question of FDU's proposal causing "less prohibited overlap" than that of NYU, or the operation of any existing station.

16. In sum, therefore, FDU presented neither appropriate facts nor supporting legal precedents for its request. And it is submitted that indeed, neither are available to support the action taken.

Accordingly, New York University requests that the Commission reconsider its July 22, 1966, action accepting the application of Fairleigh Dickinson University for filing, and requests that the application be returned, and the "Petition For Reconsideration Of Staff Action And Acceptance Of Application, Nunc Pro Tunc, Together With Waiver Of The Rules

Or Acceptance Of Minor Corrective Amendment" filed by Fairleigh Dickinson University herein on July 11, 1966, be denied.

Respectfully submitted,

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July 27, 1966

CERTIFICATE OF SERVICE

I, Emma Wootton, hereby certify that I have, this 27th day of July, 1966, sent by regular United States mail, postage prepaid, two copies of the foregoing "Petition For Reconsideration", to the following:

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